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No. 99-1356

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ROBERT A. LEVY and PHYLLIS B. LEVY,

Petitioners,

vs.

SWIFT TRANSPORTATION COMPANY
(Sparks, Nevada), et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' ARGUMENT

I.

RESPONDENTS HAVE GIVEN NO REASON WHY PETITIONERS SHOULD NOT HAVE THE OPPORTUNITY TO PRESENT EVIDENCE.

Initially respondents quibble about the Levys' use of the word "adjudicate," apparently implying that since there was no adjudication on the merits, no evidence is necessary. But the question of jurisdiction was in fact adjudicated, and as pointed out in their Petition, Pet.p.10, the non-moving party must have the opportunity to present evidence relative to jurisdiction.

Secondly, the dismissal of the CIA was not appealed because the CIA could not be a proper party in an FTCA action. This had no effect on the validity of other aspects of the Levys' appeal in the Tenth Circuit.

Respondents say that since the Levys discovered the CIA connection in July, 1995, "this left them an additional year to conduct whatever further investigation they wished and file a timely claim under the FTCA by July 1996" (Brief in Opposition, pp.3-4). But under respondents' argument, suppose the Levys had not discovered the CIA connection until August, 1996; how much time would they then have had to file a timely claim? In fact, the date of discovery of the CIA connection in July 1995 was the date their case accrued, and the filing of their claims to the CIA in May, 1997 was therefore timely.

Respondents cite *Gibson v. United States*, 781 F.2d 1334,1344 (9th Cir. 1986) as a parallel situation for this case. The Levys agree that parallels do exist with respect to the date

of accrual, but not with respect to fraudulent concealment.

Respondents failed to note an important distinguishing feature of the *Gibson* matter: the *Gibson* court, because of **"binding circuit precedent"** foreclosed itself from considering language in *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) which "supports plaintiffs' [and thereby the Levys'] proposed construction," *Gibson*, at 1344. Since the *Gibson* case was in the Ninth Circuit, such binding precedent would not hold in the Tenth Circuit, where the Levys' case was heard, or in this Court. Because of the parallels noted by respondents, the *Gibson* case thus supports the Levys' contention that under *Kubrick*, their cause of action did not accrue until July, 1995, when they discovered the CIA connection. The Levys must be given an opportunity to present evidence of concealment by the government and of their own diligence in seeking to expose such concealment.

The other case cited by respondents and by *Gibson*, namely *Dyniewicz v. United States*, 742 F 2d 484,486 (9th Cir. 1984), also supports the Levys' position, because it recognizes the significance of *Liuzzo v. United States*, 485 F.Supp. 1274 (E..D. Mich.1980)(claim did not accrue until plaintiffs had reason to believe government agent was person who caused injury where agent and other government officials, including the President, had asserted that other persons were responsible).

The parallel with *Gibson* does not extend to the question of fraudulent concealment. Here it is necessary that plaintiffs have the opportunity to obtain evidence in support of the claim of due diligence.

II.

RESPONDENTS HAVE GIVEN NO REASON WHY PETITIONERS SHOULD NOT BE ALLOWED TO AMEND THEIR COMPLAINT.

The quotation ascribed to *Boag v. MacDugal*, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed. 2d 551 (1982) should have been ascribed to *Hughes v. Rowe*, 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed. 163,169 (1980). Both cases were cited in *Eldridge v. Block*, 832 F.2d 1132, 1135-1137. The *Eldridge* court, at 1135-1137, went to great pains to point out that "a court must be guided by the underlying purpose of Rule 15--to facilitate decision on the merits rather than on the pleadings or technicalities," and that "this policy is applied even more liberally to pro se litigants," and that "Courts in fact 'provide a pro se litigant with notice of the deficiencies in his or her complaint' to ensure that the litigant uses the opportunity to amend effectively," and that "the Supreme Court has instructed the federal courts to liberally construe the 'inartful pleading' of pro se litigants."

The defect in plaintiffs' complaint pointed out by Judge Hansen was that it failed to allege actual damages. Pet., p.16a. This defect was corrected in the proposed Second Amended Complaint, Pet., pp. 30a-33a, contrary to respondents' assertion.

Moreover, since the proposed Second Amended Complaint contains allegations of tortious acts subsequent to June, 1995, Pet., pp.30a-33a, the Levys' notice to the CIA on or before June 6, 1997, was timely.

As for *Levy III*, respondents have moved for summary judgment on statute of limitations grounds, apparently ignoring plaintiffs' invocation of State and Federal saving statutes and

their request that the State court take judicial notice of the two federal cases, *Levy I* and *Levy II* in their Complaint. And, as respondents noted, it is only the non-federal defendants which are subject to the jurisdiction of the State court.

CONCLUSION

The Levys have refuted all of respondents' substantive arguments against their Petition. Accordingly, they respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

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